IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Appellant,	)	
vs.	)	No. 22725
MARGARET ELIZABETH CLINE, as surviving wife of ROBERT HERRICK CLINE, Deceased; PLATT CLINE, as Guardian of the Estates of Robert Herrick Cline II and Kelly Michael Cline, Appellees.	)	

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

APPELLEES' ANSWERING BRIEF

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Flagstaff, Arizona 86001
Attorneys for Appellees

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FEDERAL STATUTES

JURISDICTIONAL STATEMENT

The Appellees concur with the jurisdictional statement of the Appellant.

STATEMENT OF THE CASE

The Appellant states that its Statement of Facts "follows the District Court's statement in most particulars". Appellant then declares that where additional details are given the record or transcript citation will be indicated. The Appellant then goes into great detail in re-trying the case as to the facts, and in many instances interjects its view of what the facts are without giving any evidentiary support for these statements.

Instead of restating the facts of this case again, the Appellees have determined to stand upon the Statement of Facts as set forth by the District Court and the Opinion which was rendered

pursuant to the Statement of Facts. Appellees will contradict the Statement of the Case of the Appellant only in those particulars where its Statement is grossly contradictory to the findings of the Court and is not substantiated by the weight of the evidence.

The Appellant refers to a "small boat which was carrying the chemical tanks" (page 2 of Appellant's Brief). In fact, the equipment which was used to carry the chemical tanks out initially, was not a boat, but was a "float" (Tr. 21) which was used as a weed-cutter (Tr. 67). This was the apparatus which capsized, causing the chemical tanks to go to the bottom of the pond and necessitating the use of a diver to recover them. The Trial Court correctly identified this equipment and described it as a "float or raft" rather than a "boat" (R. 217).

The Appellant refers, in note numbered 3 at

page 2 of its Brief, to the "major function" of the Search and Rescue Unit. Appellees could find no reference in the record to this "major function" and feel that the Appellant did not refer to the transcript to support this additional detail or difference from the District Court's statement of facts.

The Appellant states that Cline agreed to undertake the job "for a flat fee of $25". The testimony of the Depot employees who talked with Cline (Tr. 58 and 143) is that the $25 was an estimate, with the final figure to be determined by the length of time involved in the recovery.

Appellant states at page 3 that the Depot handled the transaction with Cline as a contract, but does not indicate upon what testimony this allegation is based.

The recovery operation was alleged to be "an acquatic operation apparently being a rather novel

event" (Appellant's Brief page 3). The Transcript reference indicates that there were 45-50 people there, some of them being spectators. The District Court indicates (R. 221) that "there was on the shore a retinue of supervisory personnel, spectators and Mrs. Cline and her two small children." Not all of the persons on shore were spectators and the Appellant does not support its statement that this operation was such a novel event.

Appellant states that Cline asked for a lighter line (page 4). This assertion is refuted by the record. In fact, Teninty was not close enough to Harmon and Cline to overhear their conversation. All he knew was that he was told to get another rope and assumed that it was at Cline's request (Teninty Dep. p. 7). Harmon (pages 14-15 Harmon Dep.) states that he decided the rope originally provided was too heavy and sent for a

smaller one. He further states that Cline did not ask for the rope in Teninty's hearing. Both Harmon and Teninty (Harmon Dep. p. 16, Teninty Dep. p. 9) state that the rope was between 30 and 40 feet in length.

The Appellant mentions at page 4 that the Depot provided the two boats, the motor and the anchor. The Depot also furnished the safety line, the life jackets and the persons who were to assist Cline. (Tr. 45, Harmon Dep. pp. 11-18).

The testimony of McKissick was that he had had experience with motor boats, as is stated by Appellant at page 5. McKissick goes on, though, (Tr. 75) to state that he had definitely not had any experience in operating two boats lashed together and that the steering was "quite a bit different" from his previous experience. His previous experience was with fishing boats.

Appellant omits from its Statement of Facts

a matter which both Appellees and the Trial Court felt was worthy of mention; namely, that after the raft left the dock and before the diving operation could commence, the raft had to return to shore in order to secure additional anchoring. The anchor originally used was insufficient to hold the raft in place and additional weights had to be used. (R. 220, Tr. 84).

Appellant's Brief states that there was no regulation requiring the use of a lifeline, and states that "Patterson apparently assumed that the practice he was familiar with was regulatory." (page 5 of Appellant's Brief). In fact, reading the Transcript reference cited by Appellant indicates that Patterson had been ordered the day before to be sure that Cline had a lifeline. There was no assumption on the part of Patterson--he had received specific instructions. (Tr. 32-34; Tr. 60; Olson Dep. pp. 10-11).

Appellant's Statement of Facts implies that McKissick threw the safety line to the two men who were in the water and then threw his life jacket, and that the wind interfered and that was the extent of McKissick's actions. Instead, as stated in the Statement of Facts of the Court, each time McKissick threw something toward the men in the water the boat was drifting rapidly away from them, necessitating restarting the motor, turning the clumsy craft around into the wind and making another approach toward the men in the water. This procedure took place three times, with McKissick always approaching them into the wind, never learning his lesson that the wind was blowing so hard that he could not throw something to them into the wind. (R. 221; Harmon Dep. pp. 27-29, 38, 31-36; Tenınty Dep. pp. 16-17; Tr. 195-196, 50-53; Olson Dep. pp. 20-22).

Appellant does not cite any authority in the

record for its statement, at page 6, that "Both men sank, and when Giles came to the surface completely exhausted and alone ...". This is contradictory to the Court's statement that "Giles released Cline". (R. 221). In its footnote at the end of the paragraph, the Appellant argues that the Court's statement "is without credible support". Mrs. Cline testified (Tr. 195-196) "... And then I looked back at Rob [Cline] and Mr. Giles. And Rob put his mouthpiece in and looked at me. And then he went below the surface of the water."

Teninty in his deposition at page 19 indicates that Giles had to turn Cline loose in order to save himself. Patterson testified that Giles "said that he couldn't last any longer, or words to this effect, and he let go of Mr. Cline and started towards the boat." (Tr. 53). Mrs. Cline testified that "And Mr. Giles said that he yelled to Mr.

McKissick that he couldn't hold on any longer." (Tr. 195-196). Giles' deposition (p. 11) concurs with Mrs. Cline's statement. Also Harmon (Dep. p. 37) indicates that Giles left Cline in order to save himself. These accounts do not indicate that Giles and Cline both went underneath the surface of the water with Giles coming back up alone as is stated by the Appellant. Giles (Dep. p. 23) states that:

> "Q. After you returned to Mr. Cline did Mr. McKissick then bring the boat back up toward you again?
>
> A. It was after Mr. Cline had gone under. He had disappeared."

There is testimony to the effect that the two men in the water were going under from time to time. There is testimony from Giles that Cline was "frantic", but there is other evidence from persons on the bank who were probably not as excited as Giles was that Cline was fairly calm.

Patterson testified:

"Q You say that Mr. Giles came back to the boat. What happened with Mr. Cline?

"A He just put his hands up and settled out of sight." (Tr. 54)

In his Deposition, Olson stated:

"... here's a man that's an expert swimmer, but made no attempt at all to swim. I --

"Q Did he appear to you to be helpless in the water?

"A Yes, and I -- it's unexplainable to me." (page 19)

Harmon's Deposition reflects:

"Q Was Mr. Cline fighting with Mr. Giles, did you notice?

"A Well, not that I could tell from where I were." (pages 36-37)

Having heard this other testimony, and after reading the depositions which were introduced into evidence, the Trial Court was justified in

determining that Cline "matter-of-factly went to his death". Contrary to the statement of the Appellant, this could have occurred, and it is not "negated by the evidence", as is stated by the Appellant at page 6A of its Brief.

ARGUMENT

I.

THE DEPOT WAS NEGLIGENT

A. Cline Was An Amateur Scuba Diver

In its first Specification of Error, the Appellant states that the District Court erred in finding that Cline was an amateur scuba diver (page 8 of Appellant's Brief). The Appellant argues its premise that he was experienced at pages 10-14 of its Brief.

The expert witness on scuba diving, William Van Zandt, testified (Tr. 215-216) that 24 hours

of pool and lecture time is the minimum before an individual is certified as being "competent to get involved in underwater activities as a scuba diver".

Mrs. Cline testified that Cline had not attended classes, either individually or with the Sheriff's Search and Rescue Unit. (Tr. 181-183).

The testimony of the Sheriff indicates that no inquiry was made into the background of persons who might come to the Sheriff and volunteer for the scuba unit of the Search and Rescue group. The Sheriff testified that he never saw any certificates of qualification regarding Cline's diving competence (Tr. 114); when the group was organized the only investigation into Cline's background by the Sheriff was asking Cline if he was experienced (Tr. 108); the Sheriff testified that the group has "a regular monthly scheduled meeting" but no mention was made anywhere in the

testimony of any training or practice meetings, or meetings to examine the qualifications of divers or prospective divers. Mr. Thrailkill, who was the Sheriff's "regular diver" (Tr. 141) testified that he held scuba diving certificates and that his acquaintance with Cline was "I had just discussed with him a couple of times about diving." (Tr. 237-238). Apparently even though Cline had been the member with the longest service in the unit he was not called upon to do much diving for the unit since the "regular" diver had not dived with Cline; this is particularly material since the unit would contain only three to four men at a time, and they were instructed to dive only in pairs. (Tr. 244, 245, 110).

The Appellant points out the testimony wherein persons stated that Mr. Cline told them that he was an "experienced" diver. Of course we have no opportunity to establish that Cline never told

them that. The Sheriff decided that if Cline told him he was experienced he must be; the Depot decided that if someone dived in the Sheriff's Search and Rescue Unit he must be experienced, without inquiring whether there were any qualifications established for membership in that Unit. No one testified as to any testing or examination of qualifications or credentials prior to membership in the Search and Rescue Unit.

Plaintiffs' Exhibit 16 in evidence contains a listing of certain minimum inquiries which should be made by a person who is hiring a diver. These standards include never hiring an amateur (a person who has usually made only a few dives), never hiring an applicant who cannot produce a certificate indicating that he has training in scuba diving, never hiring someone who cannot prove a physical examination within the last year, and sooner if his physical condition is in question.

Mr. Bosley testified (Tr. 127) that publications of the National Safety Council (Exhibit 16 being such a publication) were applicable to the Depot operations.

The Sheriff, as stated by the Appellant, did testify that the deceased had made 15-20 dives. Mr. Shoemaker, though stating that he knew Cline through the Search and Rescue Unit and that his recollection of the substance of a conversation with Cline was that Cline was qualified, does not testify as to any dives which Cline might have made (Tr. 244); Thrailkill, the "regular" diver of the Unit, had not made any dives with Cline (Tr. 238); Brady at page 6 of his deposition does state that he considered Cline to be "a competent diver", but on page 5 of that deposition he states that he is no expert in judging the competence of a scuba diver.

None of these supposedly impartial witnesses

were qualified to pass upon the diving qualifications of Cline. Only one of them was a diver and he had never dived with Cline. The ones who had seen Cline dive had no real knowledge of diving and would not be presumed to know enough about diving to determine whether or not Cline was qualified. The only statement which points to any extensive diving by Cline is the Sheriff's statement of 15-20 dives which Cline had made. Cline's wife and father contradict this. No mention is made of extensive diving by Cline by any of the men who worked with the Scuba unit of the Search and Rescue Unit.

Further, the Appellant alleges that the Appellees must be bound by a statement in the newspaper of which Mr. Cline's father was publisher, to the effect that Cline was an "experienced scuba diver".

The senior Mr. Cline explained that he had

not seen the article until after its publication and that he had not provided the facts contained in the article except for giving biographical data to the writer of the newspaper account. (Tr. 175). Mr. Cline testified at page 161 that Robert was his only child. Appellees submit that the senior Cline's testimony that he did not write or review the article relating to his son's death for the reason that he didn't go to the office for a couple of days, is credible and that the fact that the senior Mr. Cline was publisher of the newspaper does not import truth to its every statement.

In light of the conflicting testimony, and the fact that the persons, whom Appellant says are "those most likely to know of Cline's qualifications", had no experience or particular knowledge which would make them competent to judge Cline's experience or competence, Appellees submit that the District Court's finding of Cline's

inexperience was based upon credible testimony and cannot be determined to be clearly erroneous.

B. The Depot Was Negligent In Providing Men And Equipment

The Appellant concurs with the District Court in determining that Cline was an independent contractor and that the duties of the contractee to the contractor are determinative of the issue. As is indicated by the Appellant the control which the contractee exercises over the contractor indicates the liability of the contractee to the contractor for injuries sustained by the contractor.

At R. 227 the District Court states that the Depot, according to the record, had control of the diving platform; the motor; the anchor, anchor line and safety line; the life preservers; and the personnel.

1. The Diving Platform

Patterson talked with Cline, set a time for the dive, and then called Teninty and ordered Teninty to have men available to assist Cline, and to provide equipment to assist him. (Tr. 27-28, 70-71; Harmon Dep. 13; Teninty Dep. 7).

None of the Depot employees can recall who suggested lashing the two boats together, but it is admitted that they decided to do this and had Depot employees prepare the boats which would be used for a platform.

No mention is made of any request by Cline to have the platform prepared in this manner.

Appellant at page 19, note 16, states that no evidence is in the record relating to the make-up of a platform except the Navy Diving Manual, Exhibit 14. On the contrary the scuba expert, Van Zandt, (Tr. 219-220) states that it is important for the platform to be stationary, and that

anchors have to be provided which will effectuate this need. Furthermore, the platform has to be anchored so that it will drift over the object which is being dived for. McKissick (Tr. 85) testifies that they dropped anchor over the spot where the tanks were thought to be and that the boat then drifted 10-15 feet. There was only one anchor. Van Zandt testified that where wind was blowing, two anchors at least would be required to hold the platform steady, (Tr. 219-220), and that three would be better; the Navy Diving Manual, Exhibit 14, requires "a two-point moor".

2. The Anchor

There was only one anchoring device, and this, at best, was makeshift. It was an eight inch length of pipe with a bottom welded in it, and filled with cable fasteners for weight. (Tr. 72-73; Aragon Dep. p. 10). The original anchor was insufficient to hold the boat so the party

went back into shore and had additional weights put into the piece of pipe. (Tr. 84; Olson Dep. p. 18). The anchor was attached to the boat with an anchor line. (Tr. 38, 73).

There is no question that the Depot provided the boats and the anchor for the diving operation.

The only question is that of the suitability of this equipment; it was provided by the contractee; the contractee's employees controlled the use of the equipment. Was the contractee negligent in this control? The District Court determined that it was.

The platform was a 12 foot boat and a 14 foot boat lashed together to make a single unit. The boats were powered by a single outboard motor, with the highest estimate of its size being 9 horsepower, but estimated by McKissick (the Depot's "expert" outboard operator) at a 4

horsepower motor. The Appellant (page 20 of Brief) asserts that the motor was sufficient and the boats were maneuverable as evidenced by the fact that the equipment approached Giles 3 times in the space of a few minutes.

In fact, McKissick testifies that the maneuverability was cumbersome, slow and clumsy (Tr. 75, 87). The testimony is clear that Giles held Cline up for a period of 8-10 minutes (Tr. 198; Giles Dep. p. 26), and during this time, either because of his own incompetence, or the awkwardness and inadequacy of his equipment, McKissick was unable to get close enough to the men to get a line to them.

3. Safety Line

As is argued by Appellant at page 21, there is a question as to the use of a "safety line". There is one type of safety line which is to be tied to the diver. In addition to this line, though,

another line (also sometimes termed a "safety line") is to be held in the boat and should be ready to throw to the diver. This second type of safety line often has attached to it a ring-buoy though it can simply be knotted. Van Zandt explains the distinction at page 220 of the Transcript:

> "Well, it should have some type of a flotation device, either a ring buoy or life-saving torpedo, or life-saving rope that you can throw. It's a weighted rope."

In other words, there should be several ropes on the diving platform. At least two and preferably three anchors should be provided, and we assume that they would be attached to ropes. The diver should have a "safety line" for tying to him. There should be also some type of a weighted rope for throwing to the diver.

The Appellant's argument that the safety line is to be attached to the diver and not thrown to

him is erroneous. Van Zandt explained that both lines are necessary (Tr. 218-220, 234). The District Court found negligence on the part of the Depot in failing to supply a ring buoy or weighted rope, and this negligence is supported by the evidence. (Tr. 77; Giles Dep. p. 6). The presence of a ring buoy is one of those items which is always required when working around water. A ring buoy is part of the standard equipment on a diving platform, and is not merely used at swimming pools, bathing beaches and on large ships. The Depot employees made sure there were life jackets for the other two men; the ring buoy is fully as standard equipment for such an operation as this was as the life jackets would be.

It is not a situation where the contractee could not anticipate trouble and therefore did not have to take precautions against it. Rather,

the contractee did anticipate difficulty and provided McKissick and Giles with life jackets. The ring buoy or weighted rope is as essential in a boat in an operation such as this as were the life jackets on the boat operator and the spectator on the boat.

The Appellant in one place argues that had Cline had the safety line attached to his body he could have been pulled into the boat (Brief page 21), and then on page 22 argues that even if a ring buoy had been provided it wouldn't have been helpful. This is sheer conjecture, completely unsupported by the evidence, and Appellant makes no effort to tie this argument into the testimony or evidence. The fact that the life jacket and unweighted rope did not come near Giles has no bearing on the question of whether a proper piece of equipment might have been more effective, and whether the failure to

provide this basic item of equipment was negligence on the part of the Appellant.

The record completely supports the District Court in its determination that the Depot was negligent in providing an unsafe and inadequate diving platform, inadequate emergency equipment, no ring buoy or weighted rope, and an inadequate motor. Nothing in the record cited by Appellant establishes that there was no negligence or that these items were adequate.

The Appellant's main argument centers around the fact that Cline was "an expert" and he should have refused to dive if anything was not as it should be. It is established that Cline was merely an amateur. Furthermore, Cline was relying on the Depot to provide the equipment for the dive. They were in charge. Van Zandt said that if a diver is working for someone and "they are telling him where he is to go down"

(Tr. 226), the surface operations are the responsibility of the contractee. This testimony would be sufficient in and of itself for the Court to find that the surface operations were the obligation of the contractee and under its control.

4. The Tenders

Appellant argues at page 23A that it was up to Cline to check into the qualifications of the tenders who were provided for him. Mrs. Cline (Tr. 201) testified that on the way out to the Depot on that day she asked whether there would be anyone to help him, as in the past, and he stated that he thought Mr. Gonzales would be there too. Mr. Gonzales was the person who had helped him the time he worked at the Depot previously. (Teninty Dep. pp. 4-6).

It seems reasonable that when Cline arrived at the scene and found the platform set up, the line being secured, the life jackets put on, and

being advised that these two men were going out with him, Cline felt that Gonzales wasn't available and that a reasonable substitute had been found to assist him.

It was only after the diving started and Giles inquired about the extra weights that Cline could have known that Giles was not experienced in diving.

The Appellant at page 18 states again that Cline complained about the first safety line. This is an erroneous assumption on the part of the Appellant, perhaps because of the statement by Teninty (Dep. p. 7) that Cline asked Harmon for another line, but then adding that he was too far away to hear the conversation. Olson (Dep. pp. 7-8) states that it was Patterson, Teninty, Marshall or McKissick who determined that the first line was not appropriate for a safety line. Harmon (Dep. pp. 11-12) states that he is the

one who determined that another line was needed, and at page 14, states that Cline did not ask for the line.

The Appellant, page 24, surmises that the really significant findings of the District Court are those relating to the rescue. This may be true. However, the Court found negligence in failing to provide proper equipment for the operation which was undertaken. It is impossible to say that the accident would not have occurred had proper equipment been provided, but neither is it possible to say that the negligence of the Depot in providing improper equipment and personnel had nothing to do with the fact that Cline encountered difficulty. For example, had the platform and anchor been positioned properly, it is possible that Cline would have come up much nearer the platform than he did, and the emergency might not have occurred. This is conjecture, it

is true, but so is the argument at pages 21-24 of Appellant's Brief. Appellant does not in any way show that the District Court's findings of negligence in providing inadequate equipment and incompetent personnel is not justified under the facts.

5. Personnel

The negligence of the personnel of the Depot is most apparent during their rescue attempts. At pages 27-33 of its Brief, the Appellant summarizes some of the testimony relating to the rescue. This summary, read with that of the District Court (R. 221-222), indicates the scene. At page 34 of its Brief, the Appellant argues that McKissick acted as a reasonable person would have acted. In its argument, though, the Appellant fails to note that McKissick made the same errors at least twice. When Giles first went in after Cline, McKissick was faced with the

dilemma posed by Appellant on page 34. However, once he started the motor, turned the boat around, and failed to get close enough to the men that Giles could reach the rope he threw, wouldn't a reasonable man have realized that different tactics were necessary on his next try? McKissick, though, did the same thing the second time, this time throwing his life jacket at the men. He threw the life jacket from approximately the same position as before, and into the wind. (Tr. 87). If he was not negligent on his first throw, he surely was on his second.

Furthermore, the Appellant overlooks the fact that while Giles was holding Cline up, and after McKissick had approached them the first time and thrown the lifeline toward them, the boat was drifting away, necessitating another session of starting the motor, turning the boat around, and reapproaching the men. This was

a slow maneuver, and McKissick surely had time to reflect upon his failure on the first pass and determine that the wind was creating difficulty. He had time to work out another plan of action whereby he could use the wind to help him, instead of throwing into the wind. McKissick did not act reasonably, however; he performed his second maneuver exactly as the first one, with the same result. In all, some eight to ten minutes elapsed; there was time for McKissick to rectify his first error, that of throwing into the wind, instead of perpetuating it again.

At page 35 the Appellant points out in a footnote that the propeller of the boat must be considered. It must be remembered that McKissick, while he was being so "reasonable", managed to get one of the ropes (either the anchor or the safety line) caught in the propeller. (Tr. 88, Giles Dep. p. 11).

Appellees submit that the actions of McKissick were not reasonable efforts under the circumstances. It is plausible that on his first attempt he would not realize the importance of approaching from the upwind side, but certainly he should have learned from his abortive first attempt. He did not, and as a consequence, Cline died.

Appellant (footnote No. 20, at page 27) points out that other Depot employees attempted to rescue Cline, and comments on the failure of the District Court to discuss this fact. In fact, these men stood on the bank until Cline had been held up by Giles for 8-10 minutes, and after Cline had disappeared and gone to the bottom, then they attempted to rescue him. (Tr. 12, 94; Harmon Dep. pp. 38-39; Teninty Dep. p. 19). No attempt was made by these men during the time that Cline was on the surface of the water.

Appellant argues that the equipment and personnel were adequate (or that it was up to Cline to object to them if they were not) and that reasonable efforts were made to rescue Cline. Where a contractee provides equipment and personnel to a contractor, the equipment and personnel must be suitable and adequate for the job which is undertaken. The contractee is liable for its negligence to the extent that it has exercised control over the operation.

> "One who entrusts work to an independent contractor, but who retains the control of any part of the work, is subject to liability for physical harm to others for whose safety the employer owes a duty to exercise reasonable care, which is caused by his failure to exercise his control with reasonable care." Fluor Corporation v. Sykes, 3 Ariz. App. 211, 413 P.2d 270 (1966).

Amacker v. Skelly Oil Co., 132 F.2d 431 (C.A. 5th, 1942), Cert. Den. 322 U.S. 760, 88 L. Ed. 1588, 64 S.C. 1278; Rehearing Den. 323

U.S. 810, 89 L. Ed. 646, 65 S.C. 29, is very closely in point to the case now being considered. In Amacker, an independent contractor was asked to send out two men without foreman and without tools to clean out an oil tank. The contractee, as does the Appellant here, argued that there was no duty on its part, that there was no breach of any duty, that the plaintiff was an independent contractor, that plaintiff was experienced, that he knew the danger, that he should have taken any necessary precautions. The District Court directed a verdict for the defendant, which was reversed on appeal. At page 433, the Court holds:

> "On this record, the defendant had supervision and control over deceased and was under a duty to exercise due care to see that the dangerous work it put him to doing was done by reasonably safe and prudent means and methods, and deceased in going into the tank to do the work required with the tools and equipment and in the way

> provided by the defendant had a right to assume that the defendant had taken adequate precautions, *** we hold that defendant owed a duty to deceased, that there was ample evidence to take the case to the jury on all the issues, ..."

As has been demonstrated, and as is admitted by the employees of the Depot (Olson Dep. pp. 10-11; Harmon Dep. pp. 13-15; Tr. 28, 30, 32-34, 35, 45, 70, 77, 80, 226), McKissick was in charge of the boat, subject to the supervision of and instructions from Teninty, Patterson, Olson and Harmon. The Depot personnel provided all the equipment except the wet suit and scuba gear which Cline borrowed (Tr. 112, 143) from the Sheriff. The Depot provided all the personnel who were to assist in the operation. Cline fits squarely into the holding of the Amacker case, that when a contractor works with the tools and equipment provided by the contractee he has the right to assume that the contractee has taken all

necessary precautions for his safety. This was not done by the Depot; it had a duty which it breached, and Cline died as a result of the breach.

C. The Depot Was Negligent In Its Rescue Attempts

After Cline was found to be "in trouble", various attempts to rescue him were made. These have been discussed factually in the preceding pages, particularly with reference to the incompetence of the personnel who were at hand to assist him on that fateful day.

It is the position of the Appellees that the employees of the Depot had a DUTY to rescue Cline, since their negligence had put him into the predicament he was in, and that their breach of this duty culminated in his death; that Appellant should be held liable for its breach in this

regard.

The Depot personnel were not volunteers as is argued by the Appellant at page 25 of its Brief. The Depot had provided the men and equipment for the operation and had the duty to protect Cline from any defects in the equipment or negligence of its employees. The negligence of the personnel has been established. They did not work "reasonably" with the equipment which was at hand. Thus, even under the Good Samaritan Doctrine, which Appellant attempts to discount, the Depot is liable.

At page 26 the Appellant states that it can "pass by the Good Samaritan doctrine for the Court has failed to find that as a result of the Government's alleged negligence Cline's position was worsened." Whether or not there was a finding on this point, the testimony was that the persons on the shore were under the impression

that there was no need for them to go to Cline's rescue because the boat was there to rescue him (Tr. 57). As to worsening his condition, both Patterson and Mrs. Cline felt that they would have been able to rescue him, and were deterred by the fact that another, supposedly more efficient means, was at hand in that a boat was maneuvering toward him. (Tr. 196-197, 53).

Appellant attempts to establish that Cline should be precluded from recovering even if the Appellant was negligent for the reason that Cline was contributorily negligent.

The bases of contributory negligence are two: Cline's failure to wear the lifeline and the fact that Appellant asserts that Cline should have stopped the operation if the men and equipment were not adequate.

As to the first, Van Zandt testified that wearing a lifeline while working in a circular

pattern "would be almost impossible ... of course the life line would become entangled in the weeds. It wouldn't allow you to make a circular pattern ... and you would be dragging the added weight of the weeds along behind you ... would be like swimming with a weight attached to you." (Tr. 224).

The Appellant's expert witness, Thrailkill, testified after Van Zandt (Tr. 236-242) and did nothing to refute this testimony. Thrailkill testified that, as a general rule, a safety line was necessary. (Tr. 238). He was not asked any questions regarding the use of a safety line in weed infested waters.

Appellant argues that Van Zandt's testimony in this regard should not be considered because Cline made semi-circular passes (as distinguished from circular) and that there was no need for Cline to make circular or semi-circular

passes. The type of passes which would be required by this job is not a matter which is in testimony, and Appellant does not give reference as to the basis for its statement that "there was no need for Cline to make circular passes in searching for the tanks".

The fact is that Cline did make circular (Teninty Dep. p. 14, Harmon Dep. p. 26) or fishhook type passes (Tr. 49, Olson Dep. p. 16), and a lifeline was detrimental to his welfare if he wore it in passes of this type (Tr. 224). It was not negligence on the part of Cline to refuse to wear the lifeline when it would have been more dangerous to him to wear it.

The Appellant argues that it was negligence for Cline to dive without a "buddy" diver. The general rules are that this is a recognized procedure; however, there were numerous people standing on shore, and two men in the boat. It

is reasonable for Cline to feel that under circumstances where there are numerous bystanders, a diving "buddy" would not be necessary.

The District Court determined that Cline was not negligent in refusing to dive because experienced divers and more adequate equipment were not made available for him; he was not negligent in not diving with a buddy; he was not negligent in relying on the Depot to rescue him after the employees of the Appellant were cognizant of his distress.

The Appellant asserts that Cline's negligence bars recovery. Under the Last Clear Chance Doctrine, which is applicable in Arizona, the possibility of negligence on the part of Cline is immaterial if his negligence had come to rest and defendant thereafter had the last clear chance to avoid injuring him by the exercise of reasonable care and failed to do so. Odekirk v. Austin,

90 Ariz. 97, 102, 366 P.2d 80 (1961); Trauscht v. Lamb, 77 Ariz. 276, 280-281, 270 P.2d 1071 (1954); Casey v. Marshall, 64 Ariz. 232, 237, 168 P.2d 240 (1946). This doctrine was considered by the Trial Court (R. 230).

D. Summary On Question Of Negligence

Appellant has argued the facts of the case at length, asserting that the Trial Court made an erroneous decision on the facts as to the question of negligence. Because most of the Court's Findings of Fact were questioned by this manner of presentation, the Appellees have given Transcript and Deposition testimony upon which the Trial Court could base its Findings.

This case was tried upon personal testimony, supported by depositions of some unavailable witnesses. Of the oral testimony

before the Court, Patterson, McKissick and Mrs. Cline were witnesses to the tragedy. Other witnesses of the circumstances by which Cline drowned testified through depositions.

The principles relating to the presumptions of, and inferences attributable to, findings of a Trial Court upon an appeal are numerous. It is settled that, in non-jury cases, the determination of the credibility of witnesses is a function peculiarly and properly for the Trial Court and his decision is not disturbed on appeal. Ruth v. Utah Construction Co., 344 F.2d 952 (C.A. 10th, 1965); Olympic Finance Co. v. Thyret, 337 F.2d 62, 68 (C.A. 9th, 1964); Costello v. Fazio, 256 F.2d 903, 908 (C.A. 9th, 1958); Tonkoff v. Barr, 245 F.2d 742, 750 (C.A. 9th, 1957); Wilbur Security Company v. Commissioner of Internal Revenue, 279 F.2d 657, 659 (C.A. 9th, 1960).

In fact, this Court has held that the decision

of the Trial Court will be upheld when it is shown that its decision is based upon the testimony of only one witness, even though other testimony contradicts this witness. Caddy-Imler Creations, Inc. v. Caddy, 299 F.2d 79, 82 (C.A. 9th, 1962).

Much of the important testimony in this case was from witnesses who testified before the Trial Court. The credibility of the witnesses was determined by the Trial Court and his determination of the facts in this matter reflect his decision as to their credibility.

One of the most settled practices in our court systems is that a decision of the Trial Court on questions of fact will not be overruled on appeal, unless a very substantial argument is made to the Appellate Court by the Appellant.

This theory of law was codified in Rule 52(a) F.R.C.P., which provides:

> "... Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses..."

Another basic premise in appellate procedure is that if two or more inferences can be made from the evidence, the Appellate Court must take the view of the evidence which is most favorable to the appellee. The Ninth Circuit has uniformly held that the decision of the Trial Court will be reversed only if that decision is "clearly erroneous" and is not supported by evidence. Tonkoff v. Barr, supra.; Wilbur Security Company v. Commissioner of Internal Revenue, supra; Hayden v. Chalfant Press, Inc., 281 F.2d 543, 547 (C.A. 9th, 1960); Lundgren v. Freeman, 307 F.2d 104, 113-115 (C.A. 9th, 1962); Teren v. Howard, 322 F.2d 949, 952 (C.A. 9th, 1963); Williams v. Kaag Manufacturers. Inc.. 338 F.2d 949 (C.A. 9th, 1964);

Stauffer Laboratories, Inc. v. Federal Trade Commission, 343 F.2d 75 (C.A. 9th, 1965); Bonneville Locks Towing Co. v. United States, 343 F.2d 790 (C.A. 9th, 1965).

II.

THE DAMAGES ARE NOT EXCESSIVE

A. The Award Is Sufficiently Specific Under Rule 52(a) F.R.C.P.

Appellant asserts at pages 41-47 that the Findings of Fact of the Trial Court are erroneous in that the Findings do not comply with F.R.C.P. 52(a) as to specificity. Particularly objectionable to the Appellant is the fact that the District Court found that Cline would have earned an average of $24,000 a year over his life time. Appellees assert that sufficient basis for this decision is in the record and that the determination

of the Trial Court is as specific as is possible on this item.

Duane Hagadone, the President of the newspaper chain which employed Cline, testified (Tr. 154-155) to Cline's financial prospects. Hagadone testified (Tr. 154) that in two or three years Cline would have been making $20,000 or more, and that would increase substantially as time went by, at least up to $30,000 (Tr. 155). On cross-examination, Mr. Hagadone testified (Tr. 156) that the present publisher, who works part-time, makes $30,000 and would make more if he had not turned over part of his normal load to an assistant.

Mr. Hagadone's testimony regarding Mr. Cline's income possibilities and job security was verified by Cline's father (Tr. 170). The Appellant has pointed to no testimony which would indicate that these income levels would not be

reached by Cline. Appellant has only argued that the District Court reached a conclusion of $24,000 without supporting his decision by evidentiary findings. Appellees submit that the Trial Court had to begin somewhere in its calculation of damages, and that the determination of an average annual income of $24,000 is supported by the evidence and is sufficiently specific that it can be reviewed on appeal. The Appellant cites cases that held that findings of fact must be specific enough that the decision can be reviewed on appeal. Appellees submit that these cases would possibly apply had the District Court determined only that the plaintiffs would recover the sum of $389,390.15 without showing the calculations for present value and cost of maintenance.

> "Neither may the court now be put in error for its failure to reveal the method employed in calculating the amount

of damages awarded, for the method of assessing unliquidated damages in any case is not required to be revealed by a trier of the facts, either court or jury. In such cases the court's informed opinion and best estimate of the damages is reflected in his award ..." Ginsberg v. Royal Ins. Co., 179 F.2d 152, 153 (C.A. 5th, 1950).

For other cases, in addition to those cited by the Appellant, which hold that the computation of the damages does not have to be included in the Findings of Fact in order to comply with F.R.C.P. 52(a), see: Robey v. Sun Record Co., 242 F.2d 684 (C.A. 5th, 1957); Chesser v. United States, 295 F.2d 310 (C.A. 7th, 1961); O'Toole v. United States, 242 F.2d 308 (C.A. 3rd, 1957).

B. Income Tax Question

In order to buttress its argument that the judgment of the Trial Court was erroneous due to excessiveness, the Appellant raises the question of whether income taxes should be considered.

Appellant argues at length on its theory that the District Court committed error in failing to make a deduction from gross earnings for federal income taxes. It is the contention of the Appellees that this argument must fail for three reasons, all as will be more fully discussed herein. First, the question of the deduction of income tax was not presented by the Appellant to the Trial Court for its determination; second, the attorney for the government entered into a stipulation at the time of trial as to damages should the Court find liability; third, the deduction of income tax from a wrongful death award is not the law in Arizona. For the first two reasons, the Appellant should be precluded from arguing that a deduction can be made at this time for income taxes; for the third reason, this Court should refuse to resubmit this case to the District Court as requested by the Appellant.

1. The Theory That Income Taxes Should Be Deducted From The Award Is Raised For The First Time On Appeal

At no time during the trial of this matter or in the memoranda presented to the District Judge was there any argument or question raised regarding a deduction for income taxes. The matter was not submitted to the Trial Court in any form or aspect. Upon reading the Appellant's Appeal Brief we find that Appellant has spent ten pages arguing that the Court of Appeals should determine that the question of damages should be remanded to the District Court for deduction of estimated income taxes.

This Court has consistently held that if a question is not briefed in or considered by the District Court then the Court of Appeals will not consider it at the time of the appeal. See Hoffman v. Halden, 268 F.2d 280, 285 and 303 (C.A.

9th, 1959); United States v. Price-McNemar Construction Company, 320 F.2d 663, 666 (C.A. 9th, 1963); Pacific Queen Fisheries v. Symes, 307 F.2d 700, 719-720 (C.A. 9th, 1962).

In the case of Partenweederei, MS Belgrano v. Weigel, 313 F.2d 423, 425 (1962), this Court stated:

> "It is sound policy to require that all claims be presented to the trial court, and not raised for the first time on appeal, nor, a fortiori, as herein, in a petition for rehearing on appeal. This requirement sets the scope of the lawsuit, thereby preventing piecemeal litigation and consequent waste of the time of both trial and appellate courts. It assures that the opposing party will know the claims he must meet. It gives the appellate court the benefit of the district court's wisdom, and it prevents a litigent from asserting before this Court a claim which he deliberately chose, for reasons of strategy, not to assert below. We find here no persuasive reason for making an exception."

Appellant has shown no persuasive reason for making an exception in the case now before

the Court. In fact, Appellant does not even acknowledge that this matter was not presented previously and gives no reason for initiating this argument at this time. Appellees submit that the question of the propriety of the deduction of income taxes was not raised timely and cannot now be pursued by the Appellant.

2. Appellant Stipulated As To The Method Of Ascertaining Damages

At the time of the trial, the attorney for the Appellant stipulated as to the method of computation of the award in the event negligence was found, including the percentage of deduction to be made from such gross amount as the Court might determine to be payable to the Appellees. The stipulation is found at pages 159-160 of the Transcript, commencing at line No. 9 on page 159:

> "MR. WALL: Your Honor, the attorney for the defendant and ourselves

have stipulated on an actuarial figure on the life expectancy, and this is based on the mortality tables, and it takes the Commissioner's 1958 Standard Ordinary Table, and it gives the life expectancy at the time of Mr. Cline's death of 42.16 years.

"Further, Your Honor, in an effort to shorten the trial we have stipulated, upon information from Mr. Charles Bentzin, an actuary in Phoenix, that it would require over that 42.16 years, to repay income at the rate of $500 per month, it would require a present investment of $121,684.42. And it is further stipulated to reduce this amount by 20 per cent, considering the cost of support of the decedent.

"Now, we do this in this regard, Your Honor. This would be in figures of $500 multiples. So of course, leaving it to the Court's discretion, if the Court found an average annual income of $1,000 a month they would multiply that figure times two, or corresponding, whatever the Court finds.

"MR. GORMLEY: That is stipulated to, as far as the Government is concerned, Your Honor.

"THE COURT: Thank you...."

The stipulation was one which included a life

expectancy of 42.16 years, a present investment of $121,684.42 for each $500 per month increment of anticipated income, and a deduction of 20% from the gross figure which would be determined from the use of the foregoing figures. No evidence was given, nor was any attempt made by Appellant to have any introduced, on the amount of taxes which might be assessed upon the future earnings of the decedent.

The cases which are cited by the Appellant supporting its contention that income taxes should be deducted involved either an unsuccessful attempt on the part of the defendant to introduce evidence relating to income taxes at the time of trial or the acceptance of such testimony and a deduction for income taxes which has been accepted on the appeal. None of the cases cited discuss a situation where there is a stipulation by the defendant as to the amount of deduction

which was to be applied to the gross amount which the Court or jury determined would have been earned by the decedent during his lifetime.

> "The power of the court to act upon facts conceded by counsel is as plain as its power to act upon evidence produced. Oscanyan v. Winchester Repeating Arms Co., 103 U.S. 261, 263, 26 L.Ed. 539, 541. The exercise of this power in a proper case is not only not objectionable, but is convenient in saving time and expense by shortening trials. Liverpool, N.Y. & P.S.S. Co. v. Emigration Comrs., 113 U.S. 33, 37, 28 L.Ed. 899, 900, 5 S. Ct. 352." Best v. District of Columbia, 291 U.S. 411, 415, 78 L.Ed. 882, 885 (1933).

The Court of Appeals of the Third Circuit had occasion to consider a stipulation similar to the one at bar in Morse Boulger Destructor Company v. Camden Fibre Mills, 239 F. 2d 382 (C.A. 3rd, 1956). The case involved a suit for the purchase price, with a verdict to be in that amount, and the jury to determine only the amount recoverable on the defendant's counterclaim. The

plaintiff subsequently sought to amend the judgment to include an amount for interest. The Court of Appeals held that since the judgment rendered was in literal accord with the stipulation, it was binding on the parties to it and binding on the Court, stating (page 383):

> "Since the latter specified the amount of the judgment to be entered, interest for the period prior to judgment would have had to have been included in the amount so specified if it was intended to be included in the judgment stipulated for. It is thus clear that the stipulation excluded such interest."

The stipulation which was entered into in the case now before the Court specifically detailed the method by which an award would be determined. The Trial Judge had to find negligence and then had to make a finding of fact of the estimated average income which Mr. Cline would have received on a monthly or yearly basis over his life expectancy. After arriving at these

findings, the stipulation would come into effect with the parties having agreed to the method of determination. There was a twenty per cent deduction. The defendant stipulated to this deduction and did not make any request for any additional deduction for federal income taxes. The Appellant is bound by its stipulation, as indicated by the following cases: Los Angeles Shipbuilding & Drydock Corporation v. United States, 289 F.2d 222, 232 (C.A. 9th, 1961); Russell v. United States, 288 F.2d 520, 525 (C.A. 9th, 1961); Pacific Queen Fisheries v. Symes, supra.; Masuda v. Kawasaki Dockyard Company, 328 F.2d 662, 665-666 (C.A. 9th, 1964); Schlemmer v. Provident Life & Accident Insurance Company, 349 F.2d 682, 684 (C.A. 9th, 1965); Diapulse Corporation of America v. Birtcher Corporation, 362 F.2d 736, 744 (C.A. 2nd, 1966); Ruderman v. United States, 355 F.2d

995 (C.A. 2nd, 1966); Osborne v. United States, 351 F.2d 111, 120 (C.A. 8th, 1965). See also Cyclopedia of Federal Procedure, by Poore and Keeber, Volume 13, 1966 edition, Section 59.40; Federal Practice & Procedure, by Barron and Holtzoff, Rules Edition, Volume 2B, Page 501, Sec. 1127.

Since the Appellant stipulated as to the amount of the deduction which should be made from the gross award, it cannot now be heard to argue that the District Court should have deducted an additional amount as an estimate of the income taxes which might have been incurred.

3. The Deduction Of Income Tax From A Wrongful Death Award Is Improper Under Arizona Law

The Brief submitted by the Appellant covers all of the more recent Federal Court cases which apply or refuse to apply the income tax deduction.

However, the Appellant indicates that the trend is to require an income tax deduction. Appellees differ with this interpretation of the law in this area. Admittedly, a minority of the jurisdictions do support Appellant's contention that an income tax deduction can be made, but not all in this minority require such a deduction. Furthermore, the rule seems clear that the Trial Court must have some discretion in determining whether the earnings involved are such that the income tax consequences are considerable.

The Appellant begins its discussion of the question of income taxes with the statement that "It would be idle to pretend that the Court's failure to take federal income taxes into account is without judicial support..." In fact, the majority rule is that the income tax deduction need not be made, and furthermore, it would seem that it is not appropriate for the Court to take the

initiative in making this deduction but that it was incumbent upon the Appellant to present this question and to give the Court some basis upon which to estimate the taxes if in fact the Appellant considered this a major factor to be considered in the case.

At page 48 of its Brief, the Appellant mentions that the Second Circuit permitted a deduction for federal income taxes in the case of O'Connor v. United States, 269 F.2d 578 (1958), and then summarized the later case of McWeeney v. New York, New Haven, Hartford RR Co., 282 F.2d 34 (1960). The McWeeney case explained that the decision in O'Connor was necessitated because the Oklahoma case law, which was binding on the Court in O'Connor, specifically required the deduction. The Court in McWeeney establishes two tests: the first is the one mentioned by the Appellant, namely, that no deduction

should be made if the earnings being considered were not above the middle reach of the income scale. The second test is that of the application of state law. At page 39 of its opinion, the Court stated:

> "We continue to adhere to Stokes where the question is one of federal law or the applicable state law is silent, ..."

Further, in Cunningham v. Rederiet Vindeggen A/S, 333 F.2d 308, 315 (C.A. 2nd, 1964), the same court stated that McWeeney had overruled O'Connor "as to any implication in the O'Connor reasoning that tax deductions were not too speculative to be considered in assessing damages."

The Cunningham case held that the New York state law (which was the applicable state law) did not approach "the clear directive the O'Connor court discerned in the state law of Oklahoma that it had to apply" and determined that a deduction for income taxes was reversible error.

The Montellier case (Montellier v. United States, 315 F.2d 180, (C.A. 2nd, 1963) was decided prior to the Cunningham decision. The Court in that case based its determination upon the first "test" established by McWeeney, that of whether the potential earnings were "above the middle reach of the income scale".

The Second Circuit which originated the line of cases with the Stokes decision (Stokes v. United Airlines, 144 F.2d 82, 1944) has, subsequent to that landmark case, eroded into some of the principles established in Stokes. Other jurisdictions, though, have continued to rely upon the Stokes decision as their mainstay, and do so to the present time.

The Second Circuit has not, contrary to the intimations of the Appellant herein, determined that a deduction for federal income taxes is required in cases where earnings would be in

excess of $16,000 annually.

LeRoy v. Sabena Belgian World Airlines, 344 F.2d 266 (1965), does include the quotation contained on page 50 of Appellant's Brief; however, just previous to the quoted passage the Court states (at page 276):

> "Whether or not the district court was required to allow for the effect of income taxes in this case, we think that it was at least a proper exercise of its discretion to do so."

This is a far cry from requiring the deduction. The Court merely held that this case was one which might be above the "middle reach of the income scale" established in McWeeney and that it was not an abuse of discretion for the Trial Court to make the deduction.

The Court in LeRoy affirms the second test of McWeeney, as follows:

> "... where federal law controls or applicable state law is silent, income taxes should not be considered in

estimating future net income. The rule applies to both jury and non-jury trials."

The most recent case in this series of Second Circuit cases is Petition of Marina Mercante Nicaraguense, S.A., 364 F.2d 118 (1966), cited at page 50 of Appellant's Brief. It appears that the Appellant was still discussing the LeRoy case in its summary of the Marina Mercante case, for the latter case involved incomes of $11,000-$11,500, $9,300-$10,500, and $11,000-$11,500, rather than the $16,000 and $25,000 figures mentioned by Appellant. Further, the Court held that deductions for federal income taxes in Marina Mercante were improper, stating, at page 126:

"...Death cases, where the deprivation of earnings is certain, would seem particularly poor candidates for extending the deduction.

"We therefore direct that the decree be modified by increasing the awards in

paragraphs 3, 4 and 5 to restore the sums deducted for taxes on future income..."

The Second Circuit, then, has not required deductions for income taxes except where it has interpreted the applicable state law as requiring such deductions. It has approved such deductions where the income is "above the middle reach of the income scale". This line of cases hardly seems to be authority for requiring a deduction in the case presently before the Court.

Appellees concur with the statement by Appellant that the other Circuits do not hold consistently one way or the other on this question.

In fact, Cox v. Northwest Airlines, Inc., 379 F.2d 893 (C.A. 7th, 1967), determined that taxes should be computed only on the earnings which would be earned by the decedent after 1979. It applied the McWeeney rule as to the earnings which would be made prior to 1979, determining

that they would not be so substantial as to require an income tax deduction prior to that time. Wetherbee v. Elgin, Joliet & Eastern Ry. Co., 191 F.2d 302 (C.A. 7th, 1951), refused to reverse on the income tax question, and went ahead and determined another basis for its reversal.

At page 51 of its Brief, the Appellant quotes from United States v. Sommers, 351 F.2d 354 (C.A. 10th, 1965). Appellees would like to call the attention of the Court to the sentence which is indicated by the second series of three dots in that quotation:

> "It is a determination best left to the exercise of sound discretion of the trial Judge, whether with or without a jury."

Appellees maintain that this omitted sentence is the key to the remainder of the quotation and that nothing in the Appellant's Brief indicates any abuse of discretion on the part of the Trial Judge

in the case under consideration by this Court.

The Appellate Court in the Sommers case did uphold the action of the District Court in deducting for federal income taxes. It was not a situation where the Appellate Court required such a deduction. It was a situation wherein the error claimed was not enough to require a reversal. At page 360, the Court states:

> "Ordinarily, the award of damages in wrongful death cases is within the discretion of the trial Judge. Such awards are not subject to accurate mathematical calculations. They will be sustained on appeal unless so grossly excessive or inadequate as to constitute clear error ..."

The Appellant discusses the Arizona case of Mitchell v. Emblade, 80 Ariz. 398, 298 P.2d 1034, and points out that this case involved a jury instruction, stating that such an instruction could be misconstrued by a jury. The distinction between a jury case and a non-jury situation

was discussed in Petition of Marina Mercante Nicaraguense, supra., p. 125, as follows:

> "Although the exact issue in McWeeney was whether a jury should be instructed to make a deduction for income taxes and the opinion relief in part on the difficulties jurors would encounter in doing this, the decision was not so limited. Indeed, as the foregoing summary makes evident, most of the reasons given for the rule there adopted are equally pertinent when the award is by a judge--perhaps even more so since the judge attempts accurate calculations whereas 'we know full well that the give and take of the jury room is in round figures and does not deal in actuarial tables, decimal points and percentages.'"

The presence or absence of a jury will not change the underlying theory of the law. The Arizona Superior Court held in Mitchell v. Emblade that "the incident of income tax has no part" in the correct measure of damages. The rule has not been changed; Arizona has specifically held that an income tax deduction is not appropriate in determining the amount of damages

which might be recoverable.

This Court correctly applied this law in United States v. Becker, 378 F.2d 319. Under the McWeeney case and others which have relied upon that case, the federal courts are bound to apply the state law in this matter if the question has been decided in the state. Arizona has determined that, under its wrongful death statute, a deduction for federal income tax is not proper; the decision in the Becker case was correct; the measure of damages is determined by the law of Arizona, the place where the claim arose, and this measure does not include a deduction for income taxes.

The Appellant (at page 54) urges "the Court to re-examine the Mitchell case, particularly in the light of its later Furumizo decision..." The Mitchell case was a decision of the Arizona Supreme Court and was not a decision of the Court

of Appeals. The Furumizo decision of this Court has no bearing on the Arizona law as expressed in the Mitchell case. The Mitchell case is still the law in Arizona.

The Furumizo decision (United States v. Furumizo, 381 F.2d 965, 1967), involves an interpretation of the law of the State of Hawaii, the statute referring specifically to "pecuniary injury". This Court in Furumizo did not say that a deduction was required; the statement was that the fact could be taken into consideration, and that it might not have been error had the Trial Court refused to consider the deduction.

The Appellant compares the Arizona statute to those of Nevada and Hawaii. There is one major difference -- the case law of Arizona specifically states that income taxes are not a consideration in the determination of damages for wrongful death. Furthermore, the recent

Arizona cases have held that "pecuniary damages" are no longer the test.

> "No longer is the life of a working man who is devoted to his family, who gives of himself, of his guidance and his love to that family, reckoned in terms of the net estate which he might leave behind." Fulton v. Johannsen, 3 Ariz. App. 562, 567, 416 P.2d 983 (1966). (emphasis supplied)

In connection with the turning away from "pecuniary damages" and "net estate" as measures of damages in Arizona, see also Boies v. Cole, 99 Ariz. 198, 407 P.2d 917 (1965); Southern Pacific Company v. Barnes, 3 Ariz. App. 483, 415 P.2d 579 (1966). The applicable portion of the Arizona statute (A.R.S. 12-613) reads as follows:

> "In an action for wrongful death, the jury shall give such damages as it deems fair and just with reference to the injury resulting from the death to the surviving parties who may be entitled to recover, and also having regard to the mitigating or aggravating circumstances attending the wrongful act, neglect or default..."

The Appellees submit that under Arizona law, and the authority of the Becker case, the federal income tax which might be assessed against the judgment in another jurisdiction, under its laws, cannot be deducted from the judgment entered by the Trial Court herein. The Appellant has not justified sufficiently its argument that the Court here should overrule its Becker decision. The Nancy Brooks v. United States case (273 F. Supp. 619, 1967) is not persuasive. The Court there specifically found no state law in the area. That is not the case before the Court where there is ample state authority to support the Trial Court in not deducting for the possibility of federal income taxes.

SUMMARY AND CONCLUSION

It must be noted that Appellant does not raise any argument that the Trial Court misapplied the

law to its Findings of Fact, but only argues that the evidence is conflicting and does not support the judgment; that the award is excessive and estimated income tax should have been deducted.

Appellant's argument on the reduction of the award by reason of taxes, even though first raised on appeal, is clearly erroneous under the applicable law dealing with wrongful death awards in Arizona. No argument is made, nor authorities cited, on the question of excessive damages.

Not one of the Trial Court's findings is totally unsupported by the evidence. While Appellant may disagree with those findings, there must be some stronger basis for reversal of a Finding of Fact than a mere difference of opinion.

This Court has held that it will not reweigh conflicting evidence, and that it will in fact consider evidence in the way that most favors the winning party below. Bonneville Locks Towing

Co. v. United States, 343 F.2d 790 (C.A. 9th, 1965).

> "If conflicting inferences may be drawn from the established facts by reasonable men, an appellate court cannot substitute its own judgment for that of the trial court." Teren v. Howard, 322 F.2d 949, 952 (C.A. 9th, 1963), citing Lundgren v. Freeman, 307 F.2d 104, 113 (C.A. 9th, 1962).

> "It is an elementary principle of law that when a verdict is attacked as being unsupported, the power of this appellate court begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted, which will support the conclusion reached by the trier of fact below. When two or more inferences can reasonably be deducted from the facts, the reviewing court is without power to substitute its deductions for those of the trial court. The rule is as applicable in reviewing the findings of a judge as it is when considering a jury's verdict." Wilbur Security Company v. Commissioner of Internal Revenue, 279 F.2d 657 (C.A. 9th, 1960).

Based upon the argument and cases cited herein, the Trial Court determined the Findings of Fact as supported by substantial evidence,

correctly applied the applicable law thereto, and its Judgment should be affirmed.

Respectfully submitted this 12th day of August, 1968.

MANGUM, WALL AND STOOPS

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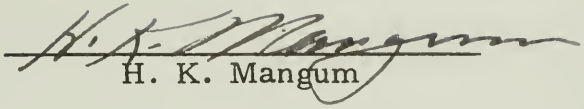
CERTIFICATE AND AFFIDAVIT

I certify that, in connection with the preparation of this Brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, effective September 1, 1967, and also Rules 28, 30, 31 and 32 of the Federal Rules of Appellate Procedure for the United States Court of Appeals, effective July 1, 1968, and that, in my opinion, the foregoing Brief is in full compliance with these Rules.

I further certify, in compliance with Rule 18 of the September 1, 1967, Rules, and Rule 31 of the July 1, 1968, Rules, that I have caused to be served upon the Attorney for Appellant, three copies of the foregoing Brief, by depositing the same, postage prepaid, addressed to the said attorney, in the United States Mails at the Post Office, Flagstaff, Arizona, on this 17th

day of August, 1968.



H. K. Mangum